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# Anti-discrimination law and the fragmentation of the enterprise

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# Complex economic organisations: definition

The concept of «complex economic organisations» indicates all cases in which:

- a) several legal entities
- b) are linked by various forms of interdependence
- c) in order to collaborate in the production or exchange of goods or services.

In all these cases, one entity or a body created by the entities of the complex organisation exerts the power to coordinate and direct the common economic activity.



# Complex economic organisations and Labour Law

Facing the different forms of complex economic organisation, labour law should readapt its scope and consider the power allocation among the entities of the organisation. In particular, the complex economic organisations force labour lawyers to reconsider both:

- a) the scope of labour regulation
- b) the rules to ascribe duties and responsibilities to each entity of the organisation.

# Antidiscrimination Law

The principles of non-discrimination are binding rules that forbid treating a subject or a group that is characterised by one or more factors listed by antidiscrimination law, in a way that produces or can produce a disadvantage.

# Structure of the Antidiscrimination control

Facing an alleged discrimination, the judge has to verify:

- a) What is the provision, criterion or practice that has produced or can produce a disparate impact;
- b) What is the relevant factor (what are the relevant factors);
- c) If the case enters in the scope of antidiscrimination law;
- d) if there is a comparator that allows to evaluate if the provision, criterion or practice has produced or can produce a disparate impact;
- e) if the unequal treatment is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary (N.B. in case of direct discrimination, the judge should just verify if one of the exception established by antidiscrimination law applies);
- f) Which sanctions and remedies to apply.

# Remedies and sanctions

«where a provision discriminates against women, the members of the disadvantaged group are to be treated in the same way and to have applied to them the same rules as the other workers and, failing correct implementation of Article 119 [art. 157] of the Treaty in national law, those rules remain the only valid point of reference» (CJEU, 15 January 1998, C-15/96, *Schöning*, par. 33; 27 June 1990, C-33/89, *Kowalska*, par. 20).

The sanctions which EU antidiscrimination law requires to be laid down in national law must be effective, proportionate and dissuasive (CJEU, *Feryn*, par. 38).

# Antidiscrimination Law

«Any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable». If the liability for infringement of the principle of equal treatment were made subject to proof of a fault attributable to the alleged discriminator, the practical effect of those principles would be weakened considerably (CJEU, 8 November 1990, C-177/88, *Dekker*, par. 24 and 26).



# Antidiscrimination Law

A provision, criterion or practice can be considered as a form of exercise of power, no matter whether it is a private or public power, legal or factual power.

Through the principles of non-discrimination, the judge can examine any form of exercise of power in relation to the effects that it can produce or has produced.



# Lexicon

DIRECT DISCRIMINATION: «direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or *would be treated* in a comparable situation» on grounds of one or more listed factors (art. 2, par. 2(a), Directive 2000/43/EC; art. 2, par. 2(a), Directive 2000/78/EC; art. 2, par. 1(a), Directive 2006/54/EC).

INDIRECT DISCRIMINATION: Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice *would put* persons characterised by one or more listed factors at a particular disadvantage compared with other persons (art. 2, par. 2(b), Directive 2000/43/EC; art. 2, par. 2(b), Directive 2000/78/EC; art. 2, par. 1(b), Directive 2006/54/EC).



# Lexicon

**INDIVIDUAL DISCRIMINATION:** the disadvantage is suffered by a person.

**COLLECTIVE DISCRIMINATION:** the disadvantage is suffered by a group (even if there is no direct victim of discrimination).

**MULTIPLE DISCRIMINATION:** the victim of discrimination is characterised by more factors.

**ASSOCIATIVE DISCRIMINATION:** Although the person who is subject to direct discrimination on grounds of disability is not herself disabled, the fact remains that it is the disability which is the ground for the less favourable treatment which she claims to have suffered. Directive 2000/78 applies not to a particular category of person but by reference to the grounds mentioned in Article 1.

**DISCRIMINATION BY PERCEPTION:** Where someone thinks a person has a particular protected characteristic, even if they do not.



# General Principle of Equality

The principles of non-discrimination are expressions of the **general principle of equal treatment** (*rectius*, general principle of equality), recognised by the CJEU as **general principle of EU law** (CJEU, 22 November 2005, C-144/04, *Mangold*, par. 75).

“It is for the national court, hearing proceedings between individuals, to ensure that the principle of non discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement to ask the Court for a preliminary ruling on the interpretation of that principle (CJEU, C-555/07, *Kücükdeveci*, par. 56).



# General Principle of Equality

“A national court adjudicating in a **dispute between private persons** falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. **Neither the principles of legal certainty and the protection of legitimate expectations** nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to **bring proceedings to establish the liability of the Member State concerned for breach of EU law** can alter that obligation” (CJEU, C-441/14, *Dansk Industri*, par. 43).



# The scope of Antidiscrimination Law

According to art. 3, par. 1 Directive 2000/43/EC, as well as art. 3 par. 1 Directive 2000/78/EC, the Directives «shall apply to **all persons**, as regards both the public and private sectors, including public bodies, **in relation to** [...]».

Art. 14, par. 1 Directive 2006/54 affirms that «There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, **in relation to** [...]».

# The scope of Antidiscrimination Law

The Directives do not state who should be held liable for discrimination: whoever exerts power in the scope of the Directives is required to respect the prohibition of discrimination established therein.

Consequently, **the actor discriminating against an employee or a group of employees is not necessary their employer.**

# The scope of Antidiscrimination Law

According to CJEU case law, the effectiveness of art. 157 TFEU “would be considerably diminished and the legal protection required to ensure real equality would be seriously impaired if an employee or an employee’s dependants could rely on that provision only as against the employer, and not as against those who are expressly charged with performing the employer’s obligations [...] For Article 119 [now art. 157] of the Treaty to be effective, any person who has to pay benefits falling within the scope of that provision must comply with it” (CJEU, 9 October 2001, C-379/99, *Menauer*, par. 29 and 30).

# Liability for Discrimination

A discrimination is normally ascribed to its author, i.e. the person who has exerted the power that has produced or can produce the discriminatory effect.

**1) the discriminatory effect can be the result of a plurality of decisions.**

An instruction to discriminate against persons on grounds of a listed factor shall be deemed to be discrimination (art. 2, par. 4 Directive 2000/43/EC; art. 2, par. 4 Directive 2000/78/EC; art. 2, par. 2 Directive 2006/54/EC).

➡ CJEU, *Asociația Accept*, FIAT case and CJEU case-law on EU Competition Law



# CJEU, *Asociația Accept*

The case concerns an interview given by a former shareholder of the Romanian FC Steaua Bucurest, in which he expressed his disappointment at the possible transfer of a professional footballer, supposed to be homosexual. Even if this former shareholder did not have the legal capacity to bind the club, he was perceived in the media and by the public as playing a leading role in the club. Therefore, **he exerted a factual influence on FC Steaua**, so that Steaua's decision not to sign a contract of employment with the player supposed to be homosexual can be considered a consequence of his statements.

# FIAT case

The decision of Fabbrica Italia Pomigliano (FIP) not to hire employees who were members of a Trade Union was attributed to FIAT Auto S.p.A. since it owned 100% of FIP's capital and appointed all the FIP managers.



# CJEU case-law on EU Competition Law

“the parent company and its subsidiary form a **single economic unit** and therefore form a **single undertaking** [...] the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC [now art. 101 TFUE] enables the Commission to address a decision imposing fines on the parent company, without having to establish the personal involvement of the latter in the infringement” (CJEU, 10 September 2009, C-97/08, *Akzo Nobel NV*, par. 59). Therefore, the parent company “is regarded as **jointly and severally liable with the other legal persons making up that unit for infringements of competition law**. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it” (CJEU, 10 September 2009, C-97/08, *Akzo Nobel NV*, par. 77)

# Liability for Discrimination

**2) the discriminatory effect can be entailed by a commercial contract.**

➡ Italian Constitutional Court, decision n. 17/1987

**3) persons can be liable for discrimination not only in cases in which they have actively exercised power but even in cases in which they have illegally tolerated an act of discrimination**

➡ TAW, Tribunal of Brescia, *National Council for Combating Discrimination (NCCD) and L Rausch v. S.C. Elaine S.R.L.*

➡ Duty of vigilance of the parent company over its subsidiaries



# Italian Constitutional Court, decision n. 17/1987

A female employee of a security company had been dismissed because her company could no longer provide a job for a female employee. Indeed, in the contract concluded by the security company and the user undertaking, it was stated that security services could not be provided by female employees. The Constitutional Court ruled that the prohibition on discrimination on the ground of sex is **binding on all citizens. The prohibition must thus be respected both by the employer and by the user**, so that the clauses in the commercial contract discriminating against female employees are void. Moreover, a dismissal cannot be founded on the breach of a commercial contract based on an act of discrimination.

# Temporary Agency Workers

A temporary work agency can be deemed to be liable for discrimination against temporary agency workers resulting from the practices adopted by a user undertaking since, in its role as the employer of the temporary agency workers, it has a “**duty to ensure the safety and health of workers in every aspect related to the work**” (art. 5, par. 1 Directive 89/391/EEC).



# Tribunal of Brescia, *Il sole delle Alpi*

Discrimination had taken place against teachers working in Adro (a small town in the province of Brescia) due to the actions of the Municipality and the Ministry of Education. The Municipality had materially placed the Lega Nord symbol in the classrooms, and so violated the prohibition on discrimination on the ground of belief. The Ministry of Education was the employer of the teachers, and had illegally tolerated the discriminatory practice against its employees (i.e. **the employer was found to be liable for failing to protect the employees from the discriminatory practice of a third person acting in the workplace**).



## *National Council for Combating Discrimination (NCCD) and L Rausch v. S.C. Elaine S.R.L.*

Ms. Rausch was refused entry to a night club due to her disability. The doorman who turned Ms. Rausch away was not an employee of the club but of a security company. The NCCD stated that private companies are obliged to include in their internal regulations provisions about equality and non-discrimination and provisions referring to the management of discrimination cases. Therefore, **they can be liable for actions of their contractors.**



# Duty of vigilance

The introduction of a mandatory **duty of vigilance of the parent company over its subsidiaries**, subcontractors and suppliers is under discussion by the French Parliament.

Directive 2014/95/EU obliges large public-interest entities to publish a non – financial statement that includes **due diligence processes implemented**.

“The company is committed to **ensuring that its suppliers and subcontractors comply with the principles of equality between women and men**” (Art. 13 Gdf Suez Group European Agreement on Professional Equality between Women and Men).

# Comparison

The discriminatory effect must be evaluated considering all the persons subject to the power, i.e. all those potentially subject to a decision.

There is no reason to consider as potentially subject only employees hired by the employer: the principles of non-discrimination allow the courts to ascertain the exercise of any power that falls within their scope, even beyond the contract of employment.

## 1) “single source” approach

⇒ CJEU, *Lawrence and Allonby*; Irish High Court, *Catholic University School v Dooley*; Court of Appeal, *Robertson & Ors v Department for Environmental Food & Rural Affairs*; Tribunal, *Glasgow City Council & Anor v Unison Claimants & Ors*

# CJEU, *Lawrence*

A group of female workers had been hired by the North Yorkshire County Council for cleaning and catering services in schools, and then transferred to three private companies to which the Council contracted out catering and cleaning services. The three private companies re-employed the female staff at rates of pay lower than those paid by the Council prior to the transfer of activities.

There is “nothing in the wording of Article 141(1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer” (CJEU, 17 September 2002, C-320/00, *Lawrence*, par. 17). However, where “the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a **single source [i.e. statutory rules, collective agreements, group regulations]**, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141(1) EC” (par. 18).

# CJEU, *Allonby*

A number of female lecturers employed by the Accrington & Rossendale College were dismissed and then re-engaged through the Education Lecturing Services (ELS). ELS operated as an agency, holding a database of available lecturers. Colleges could call on ELS to provide contract lecturers. As a result, the pay of the lecturers fell and they lost a series of benefits linked to their employment.

In both cases the conditions of employment were established in the contracts to provide services signed by the Council and the College. The single source could have been located in these contracts.

# Comparison

## 2) Associated Employer

➡ Appeal Tribunal, *Glasgow City Council & Anor v Unison Claimants & Ors*

According to section 1(6) of the Equal Pay Act 1970 (now replaced by the Equality Act 2010, part III, section 19(1), men shall also “be treated as in the same employment with a woman if they are men employed by her employer or any **associated employer**”.

“two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control”.



# Conseil des Prud'hommes de Paris (Commerce) on 16.4.2013

A number of **immigrant women** were engaged by a service provider (SA *Française de Service Groupe*) in room cleaning services in *Hotel Sofitel Paris Bercy*, according to a contract signed by the hotel and the provider. The collective agreement applied to the hotel's employees was not applied to the provider's employees and as a result the cleaning staff received a lower salary.

In the judges' opinion, the lower pay should be deemed to be **indirect discrimination against the female employees**. The contract signed by the hotel and the service provider aimed only to reduce the cleaning costs. This reason could not justify unequal treatment against the female employees. **The service provider only** was ordered to pay its employees the salary paid to the employees of the hotel performing similar work.

# Conclusion

- a) the principles of non-discrimination do not bind the employer only;
- b) any decision (i.e. any form of exercise of power) can be submitted to the antidiscrimination test;
- c) liability for discrimination should consider the allocation of power and can be related to an act or an omission;
- d) the detection of a comparator should also consider the allocation of power and cannot be limited to employees hired by the same employer.

Thank you  
for your  
attention!



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